Stephen H.M. Bloch #7813
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, UT 84111
Tel: (801) 486-3161

Sharon Buccino, *pro hac vice*
Michael E. Wall, *pro hac vice*
Margaret T. Hsieh, *pro hac vice*
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Tel: (415) 875-6100
[additional addresses on signature page]

Walton Morris, *pro hac vice*
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Tel: (434) 293-6616
Attorneys for Petitioners

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB et al., Petitioners, UTAH DIV. OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondents/Intervenors.	PETITIONERS' SURREPLY TO ALTON COAL DEVELOPMENT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY—AWARD OF FEES AND COSTS Docket No. 2009-019 Cause No. C/025/0005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Whether the Board should allow discovery here is indeed a "simple question," but Alton has arrived at the wrong conclusion. The Utah Supreme Court has made clear that "[t]he use of discovery should not be . . . distorted into a 'fishing expedition' in the hope that something may be uncovered." *State By & Through Rd. Comm'n v. Petty*, 412 P.2d 914, 918 (Utah 1966). A "fishing expedition" is "[d]iscovery sought on general, loose, and vague allegations, or on suspicion, surmise, or vague guesses." *Black's Law Dictionary* 637 (6th ed. 1990). Alton is fishing, and so its motion should be denied.

"When a plaintiff first pleads its allegations in entirely indefinite terms, without in fact knowing of any specific wrongdoing by the defendant, and then bases massive discovery requests upon those nebulous allegations, in the hope of finding particular evidence of wrongdoing, that plaintiff abuses the judicial process." *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1238 (10th Cir. 2000). That is exactly what Alton has done here, except that Alton has not even pleaded that Petitioners acted in "bad faith for the purpose of harassing or embarrassing the permittee." And Alton's proposed fishing expedition is especially troubling because it would trawl through constitutionally protected and plainly privileged materials.

Alton has failed to cite a single Utah case that has allowed discovery in circumstances like those presented here, and has not justified its fishing expedition. The Board should deny Alton's motion for discovery.

ARGUMENT

I. Alton Has No "Right" to Discovery

Alton repeatedly claims that it has a "constitutional . . . due process right" to take discovery. Alton Reply 6; *accord id.* at 11; *see also id.* at 4 nn.2 & 5. But under established Utah law, there is "no constitutional right, either implied or explicit, to formal discovery in administrative proceedings." *Petro-Hunt, LLC v. Dep't of Workforce Servs., Div. of Adjudication*, 197 P.3d 107, 111 (Utah Ct. App. 2008); *accord* 2 Am. Jur. 2d *Admin. Law* § 327 (1994). Alton's contrary assertion is meritless.[1]

Alton also claims that it has a due process right to take discovery *now* because it could not have known to take discovery on the possibility of "bad faith" before. *See* Alton Reply 3-6. But the Board has already rejected Alton's premise that it was not on notice of the "bad faith" requirement until the Board ruled on the attorney fee standard:

> [T]here has been no lack of notice to [Alton Coal Development] or any other party that the bad faith standard remains a controlling part of the approved Utah coal program, and its application raises no issues of 'procedural fairness.' . . . For these reasons, *all have been on notice that the bad faith standard remains controlling.*

Order on Reconsideration of Ruling Concerning Legal Standard Governing Fee Petitions 7 n.8, Utah Bd. of Oil, Gas & Mining, Docket No. 2009-019, Cause No. C/025/0005 (Sept. 16, 2013) (hereinafter Order on Reconsideration) (emphasis added). Alton's renewed "no notice" argument ignores this Board's explicit contrary ruling.

---

[1] "Due process," in general terms, refers to a person's constitutional right to notice and an opportunity to be heard before the government deprives the person of life, liberty, or property. *See generally Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 488 (Utah 2011).

Nor does Alton have the *statutory* "right" to discovery it claims. *See* Alton Reply 5. Although Alton cites Utah Code section 40-10-6.7 as support for its supposed statutory right, that section creates no entitlement to discovery. It instead establishes a right to examine evidence presented to the Board and to cross-examine witnesses, and a prohibition on *ex parte* communications. But section 40-10-6.7 conspicuously omits discovery from its list of procedures that "guarantee[] the parties' due process rights" in administrative hearings. *See* Utah Code Ann. § 40-10-6.7(2)(b).

This Board's rules do not give Alton a "right" to discovery either. The plain text of Rule 641-108-900, which Alton invokes, states that discovery "may" be authorized for "good cause shown." Utah Admin. Code r. 641-108-900. And discovery under the Utah Rules of Civil Procedure, which this Board applies when it allows discovery, is conditional. *See, e.g.*, Utah R. Civ. P. 37(c). Utah courts often limit discovery under the Rules of Civil Procedure by prohibiting discovery of particular issues or types.[2]

Alton's insistence on a "right" to discovery has no legal basis. No Utah court or legislative body has recognized such a right, and this Board should not invent one.

II. Utah Precedent Does Not Allow Fishing Expeditions

Although Alton has denied that it is on a "fishing expedition," its proposed discovery tells a different tale. Without evidence of bad faith, Alton does not know

---

[2] *See, e.g., Askew v. Hardman*, 918 P.2d 469, 475-76 (Utah 1996) (applying Utah Rule of Civil Procedure 26(b)(3) to limit document discovery); *Stone v. Stone*, 431 P.2d 802, 804 (Utah 1967) (affirming trial court order refusing a mental examination of the plaintiff, despite the relevance of the plaintiff's mental state to the disputed issue of child custody).

what it is looking for. It has therefore demanded sweeping discovery that would allow it to rifle through Petitioners' files in an unsubstantiated hope that it might stumble on *something* that would support its conjecture that Petitioners litigated with an improper purpose. *See* Pet'rs' Resp. 15-23 (describing the discovery Alton asked the Board to approve). If this is not a fishing expedition, it is hard to imagine what would be.

The Utah Supreme Court has condemned such fishing expeditions. *Petty*, 412 P.2d at 918. It is the courts' job, or here the Board's, "to prevent [such] undirected rummaging . . . for evidence of some unknown wrongdoing." *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 531 (2009). This Board should cut short Alton's fishing expedition and deny its motion for discovery.

III. Alton Has Identified No Evidence that Petitioners Brought this Action to Harass or Embarrass Alton, Rather than to Conserve the Environment

A. Petitioners' Environmental Views Cannot Justify Alton's Discovery

Alton's reply brief implies that the Board should "infer" that Petitioners "may" have acted in bad faith because Petitioners are environmental and conservation groups that allegedly "oppos[e] coal mining." Alton Reply 5. That argument turns common sense on its head: The obvious reason Petitioners litigated this matter is to protect and conserve the environment, not to harass or embarrass a company that they hardly know.

Such an inference also ignores this Board's own holding, in this case, that the "bad faith" fee standard furthers the Utah coal program's "statutory purpose of encouraging 'public participation in the development, revision, and enforcement of'"

that program. Order on Reconsideration 10 (citing Utah Code Ann. § 40-10-2(4)). Subjecting members of the public to burdensome and intrusive discovery simply because they support environmental protections would discourage those citizens from becoming involved. That would be contrary to the Utah coal program's statutory purpose of encouraging public participation.

In any event, Petitioners' environmental advocacy, in and of itself, is certainly not a proper basis for authorizing discovery. Such advocacy is an exercise of the right to petition the government, "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" and a right "implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (citations omitted). A ruling by the Board granting discovery *because* of Petitioners' advocacy would raise grave constitutional concerns. Petitioners' challenge to the Coal Hollow Mine permit is protected under the Petition Clause of the First Amendment, which "shields . . . concerted effort[s] to influence public officials regardless of intent or purpose." *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *see also BE & K Constr.*, 536 U.S. at 525 (extending *Pennington* doctrine beyond its original antitrust context). *Pennington* protection extends to lawsuits intended to influence or change government action. *See, e.g., Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972). Inferring bad faith from Petitioners' advocacy would contravene these First Amendment principles.

B. Petitioners' Loss on the Merits Cannot Justify Alton's Discovery

Petitioners lost on the merits, but that loss does not indicate bad faith. Alton's suggestion that the Board draw a contrary inference ignores both binding Utah case law and the record of this proceeding.

Alton mistakenly asserts that "[b]efore the Board, Petitioners attempted to advance their claims without submitting evidence, relying solely on legal argumentation and cross-examination." Alton Reply 5. This is not correct: Petitioners submitted considerable evidence, including their own experts' testimony. *See, e.g.*, Findings of Fact, Conclusions of Law, and Final Order 10, 19, 28, 29, 32, 39, 44, 45, 50, Utah Bd. of Oil, Gas & Mining, Docket No. 2009-019, Cause No. C/025/0005 (Nov. 22, 2010) (hereinafter "Final Order"). Petitioners also submitted documents and elicited testimony through cross-examination, both of which are plainly "evidence" on which a party may rely to prove its case. *See, e.g., United States v. Nelson*, 740 F. Supp. 1502, 1517 (D. Kan. 1990) (holding that a party had, through cross-examination, proved an issue by a preponderance of the evidence); *see also United States v. Crockett*, 435 F.3d 1305, 1313 (10th Cir. 2006) (referring to cross-examination testimony as evidence); *see also, e.g.*, Final Order 10, 39-40. Indeed, when a petitioner is challenging the Division's decision, that challenge may have to rely on cross-examination of Division staff.

While the Board majority ultimately found that the Division "exercised its scientific and technical judgment properly," it ruled for the Division because "the *weight* of the evidence" supported the Division. Final Order 7 (emphasis added), 32; *accord, e.g., id.* at 21, 29, 30, 39. Board member Payne disagreed in part, and would have ruled for

Petitioners on some issues. Final Order 35, 38. In short, Petitioners lost. But they lost because the Board majority found the Division's expert testimony more reliable—and was persuaded that the Division acted within its legal discretion—not because Petitioners proceeded "without submitting evidence," as Alton mistakenly states.[3] Alton Reply 5.

Even if Alton had accurately characterized Petitioners' litigation of this matter, however, that would not support an inference of bad faith. The Utah Supreme Court has made clear that even where plaintiffs are "clearly pursuing a meritless claim . . . that conduct does not rise to lack of good faith." *Still Standing Stable, LLC v. Allen*, 122 P.3d 556, 560 (Utah 2005) (internal quotation marks omitted). Indeed, in *Still Standing*, the Supreme Court reversed a finding of "bad faith" *despite* the trial court's determination that the plaintiff's action was "frivolous." *Id.* As the Supreme Court explained, "the 'bad faith' determination must be made independently of the 'without merit' determination." *Id.*

---

[3] Alton is also wrong that the Utah Supreme Court found that Petitioners had brought a claim "with neither legal nor factual support." Alton Reply 5 (citing *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 289 P.3d 558, 566, 2012 UT 73, ¶ 30 (Utah 2012)). Alton cites to the Supreme Court's statement that Petitioners did not "marshal the Board's factual findings with respect to" one issue. *Id.* The requirement to "marshal" evidence obliges a party that appeals from a lower court's factual finding to collect, or "marshal," all the evidence that *supported* the finding from which that party is appealing. *See, e.g., Wardley Better Homes & Gardens v. Cannon*, 61 P.3d 1009, 1014 (Utah 2002). But, as the Supreme Court explained, Petitioners had not actually appealed from the factual finding as to which they did not "marshal" the evidence. *Sierra Club*, 289 P.3d at 566, 2012 UT 73, ¶ 30. The Court never said, as Alton represents, that Petitioners had submitted no evidence *of their own* to the Board. *Compare* Alton Reply 5.

Alton's suggestion that Petitioners' loss allows an inference that there "may" have been "bad faith" is little more than an attempt to reargue the "bad faith" standard itself. Alton opposed that standard, arguing that the company should be able to recover fees by showing that Petitioners' arguments were "unreasonable," "groundless," or "frivolous." *See* Wall Decl., Ex. A [Feb. 27, 2013 Hr'g Tr. 8-9]. The Board disagreed, and adopted the "bad faith" standard instead. *See* Decision and Order on the Legal Standard Governing Fee Petitions 3-4, Utah Bd. of Oil, Gas & Mining, Docket No. 2009-019, Cause No. C/025/0005 (Mar. 27, 2013) (hereinafter "Order on Fee Petition Legal Standard"). By now equating "bad faith" with a merits loss, Alton is trying to circumvent this Board's ruling.[4]

IV. Discovery Is Not Justified Merely Because Alton Hopes to Find Evidence that Might Be Relevant to a Possible Future Claim

Alton's other main argument is that, if evidence of bad faith were unearthed through discovery, such evidence might be *relevant* to a future fee claim. Alton Reply 3-4. The hypothetical relevance of vaguely imagined evidence, to a claim Alton has not actually asserted, does not justify discovery here.

---

[4] Alton mistakenly suggests that the "bad faith" standard here is the same as the standard under a statute that allows a fee motion against a party that asserts a claim "not . . . in good faith." Alton Reply 5 (citing Utah Code § 78B-5-825(1)). But what Alton would have to show here is that Petitioners litigated, not just in "bad faith," but "in bad faith *for the purpose of harassing or embarrassing*" their adversary. Order on Fee Petition Legal Standard 3-4 (emphasis added). The statute that Alton looks to for a definition of "bad faith" did not require proof of a purpose to harass or embarrass an adversary, and is therefore not informative of the meaning of that part of this Board's fee standard. *See Wardley Better Homes & Garden v. Cannon*, 21 P.3d 235, 238 (Utah Ct. App. 2001), *rev'd on other grounds*, 61 P.3d 1009, 1014 (Utah 2002).

First, the discovery Alton seeks is not "relevant to the claim or defense of any party" within the meaning of Utah Rule of Civil Procedure 26(b)(1). That rule generally allows discovery only as to a claim that has already been pleaded. *See, e.g., Bainum v. Mackay*, 391 P.2d 436, 436 (Utah 1964) (disallowing a pre-claim "fishing expedition for the purpose of preparing a complaint"). Alton has not pleaded that Petitioners litigated in bad faith for the purpose of harassing or embarrassing Alton. *See* Alton Reply 4 (denying that Alton must specifically plead bad faith). To the contrary, Alton's counsel explicitly argued to the Board—twice—that Alton cannot meet that standard.[5] *See* Wall Decl., Ex. A [Feb. 27, 2013 Hr'g Tr. 11-13].

Second, if the possible relevance of hypothesized evidence constituted "good cause" for discovery, then "good cause" would *always* exist. The party seeking discovery would simply have to contend that "relevant" evidence might be found. That is not what this Board's rules say.

Rule 641-108-900, which Alton invokes, provides that: "[*u*]*pon* the motion of a party and *for good cause shown*, the Board may authorize such manner of discovery against another party, . . . in the manner provided by the Utah Rules of Civil Procedure." Utah Admin Code. r. 641-108-900 (emphases added). The word "upon" contemplates that the Board will determine *whether* there is "good cause" for discovery at all before applying the Utah Rules of Civil Procedure to determine *what* discovery to allow. "Relevance" is a requirement of the Rules of Civil Procedure, separate from the

---

[5] Utah courts routinely rely on the concessions of counsel made at argument. *See, e.g., State v. Houston*, 263 P.3d 1226, 1231 n.5 (Utah Ct. App. 2011).

"good cause" requirement of Rule 641-108-900. Utah courts "avoid interpretations that will render portions of a statute superfluous or inoperative." *Hall v. Utah State Dep't of Corr.*, 24 P.3d 958, 963 (Utah 2001). Thus, something more than possible "relevance" is needed to show "good cause."

The proper standard for allowing discovery here is set out in a case that Alton itself cites: post-hearing discovery in an administrative proceeding like this should be available "only if the party alleging [impropriety] first shows, by affidavit or other substantial factual evidence, that there is good cause to believe" impropriety has occurred. *Peoples Natural Gas Div. of N. Natural Gas Co. v. Pub. Utils. Comm'n*, 626 P.2d 159, 163 (Colo. 1981). Requiring such a showing before allowing discovery respects the Utah Supreme Court's admonition against "turn[ing] fee award determinations into satellite litigation with full scale discovery." *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992). Alton has not pleaded that Petitioners acted in bad faith for the purpose of harassing or embarrassing the company, let alone presented evidence to support such an allegation. Its discovery motion should be denied.

V. Discovery Is Not Necessary to Litigate Bad Faith

Utah courts routinely determine whether parties acted in bad faith based exclusively on the record of the underlying litigation, without the need for discovery. *See* Pet'rs' Resp. 6-7 (citing many Utah cases). Alton is thus wrong that discovery is essential to litigating bad faith claims.[6] *See* Alton Reply 2.

[6] To the extent the Division's brief also suggests discovery may be needed if Alton files a pleading alleging that Petitioners acted in bad faith, the Division's brief does not account for these Utah cases. *See* Division Resp. 9-10.

Alton misses the point with its protests that Utah cases do not "mandate" litigation of "bad faith" without discovery. Alton Reply 6. It is *Alton* that has argued that "[i]n the absence of discovery, obtaining proof of another party's subjective intent is likely insurmountable." Alton Reply 5 n.2. Utah precedent shows that assertion to be false. Alton has identified no Utah case requiring or even allowing such discovery.[7] Instead, Utah courts have consistently, and in diverse circumstances, relied *exclusively* on the record of the merits proceedings to assess parties' motives for bringing suit.[8]

Alton's problem is not that a litigant inherently needs discovery to fairly present a "bad faith" claim, but that the record of this case—the customary basis on which a "bad faith" claim is litigated and decided—*does not show* that Petitioners acted in bad faith. Alton's lack of evidence that Petitioners brought this action in bad faith, for the

---

[7] *Wardley Better Homes & Gardens v. Cannon*, a case on which Alton relies, *see* Alton Reply 5, based its finding that the plaintiff brokerage had sued in bad faith on evidence from the existing litigation record, not on post-hearing discovery into bad faith, *see* 61 P.3d at 1013, 1018.

[8] Alton tries to distinguish the cases cited by Petitioners by pointing to differences that are irrelevant. *See* Alton Reply 7. For example, a court's ability to evaluate a party's good or bad faith based on the underlying record does not depend on the party's testimony or an admission by counsel. *Compare Jeschke v. Willis*, 811 P.2d 202, 203-04 (Utah Ct. App. 1991) (plaintiff's dishonesty revealed during his own testimony and admitted by counsel) *with Livingston Fin., LLC v. Migliore*, 299 P.3d 620, 622-24 (Utah Ct. App. 2013) (defendant's bad faith revealed through conduct, rather than through testimony or admission). Nor does it turn on whether a party provides notice of intent to seek attorney fees at the very outset of a case, *see, e.g., Blum v. Dahl*, 283 P.3d 963, 964 (Utah Ct. App. 2012), or only through a post-trial motion, *see, e.g., Rohan v. Boseman*, 46 P.3d 753, 756 (Utah Ct. App. 2002). Likewise, whether a court allows parties to submit evidence of bad faith after trial, *see Blum*, 283 P.3d at 965, is distinct from whether a court permits discovery on bad faith after trial.

purpose of harassing or embarrassing the company, is a reason to deny discovery, not to allow it.

VI. Precedent Illustrates What Alton Was Required to Show to Justify Discovery

Precedent relied on by Alton requires defendants who seek post-merits discovery regarding a possible impropriety to allege the impropriety specifically and to adduce evidence that their allegations have a plausible factual basis *before* the discovery request can be granted. This Board should follow that approach here.

Alton quotes *Peoples Natural Gas Division of Northern Natural Gas Co. v. Public Utilities Commission* for the proposition that "[t]he power to block discovery may not properly be exercised when the evidence which is sought is of the sort which must be considered by an administrative body in exercising the discretion vested in it by the legislature." Alton Reply 9 (citing *Peoples*, 626 P.2d at 163). Alton quotes this sentence out of context and ignores *Peoples'* actual holding: post-hearing discovery into alleged improper *ex parte* contacts was properly denied because that discovery was supported by nothing but "information and belief" and evidence that was merely *consistent with* but not actually *supportive of* such impropriety. 626 P.2d at 161, 163-64. As the Court ruled:

> [I]n a post-hearing, pre-appeal administrative proceeding, discovery should be available as a matter of right only if the party alleging procedural irregularities *first shows, by affidavit or other substantial factual evidence, that there is good cause to believe* [an impropriety has occurred.]

Id. at 163 (emphasis added). The rule announced in *Peoples* applies here: absent a specific allegation, supported by an affidavit or other substantial factual evidence, that

Petitioners acted in bad faith for the purpose of harassing or embarrassing Alton, this Board should not authorize Alton's proposed discovery.[9]

VII. The Specific Discovery Alton Asks this Board to Approve Is Unduly Burdensome and Directed at Privileged Information

Alton asks this Board to authorize sweeping written discovery requests, attached to its motion, and unlimited depositions of every person identified during discovery. Alton has made no meaningful attempt to justify this indiscriminate discovery.

Utah Rule of Civil Procedure 26(b)(1) expressly bars discovery of matters that are privileged. Yet the whole point of Alton's discovery seems to be to uncover Petitioners' counsel's legal advice concerning the merits of this case and to explore counsel's preparation of the case. Such attorney-client communications and attorney work product are privileged, and are not generally discoverable. *See* Pet'rs' Resp. 20-22.

Utah Rule of Civil Procedure 26(b) also requires discovery to be "proportional" (or, under the version of the rule in effect before 2011, not "unduly burdensome").[10]

---

[9] Cases under the Hyde Amendment require a similar showing for post-hearing discovery into alleged bad faith. Alton tries to distinguish these cases by contending that "uncertainty exists whether the Hyde Amendment even allows discovery." Alton Reply 8. But the cases Petitioners cited assumed that the Hyde Amendment permits discovery; the question was under what circumstances. *See, e.g., United States v. Lindberg*, 220 F.3d 1120, 1126 (9th Cir. 2000); *United States v. Aubrey*, 290 F. Supp. 2d 1215, 1218 (D. Mont. 2003). Alton also makes too much of courts' concern with construing the Hyde Amendment strictly, to avoid chilling prosecutorial discretion. *See* Alton Reply 8. The context here also weighs against discovery, for the Utah Supreme Court has disapproved of "turn[ing] fee award determinations into satellite litigation with full scale discovery, thereby increasing the overall cost of litigation." *Cottonwood Mall Co.*, 830 P.2d at 268.

[10] Rule 26's language changed in 2011. *See generally* Pet'rs' Resp. 14 n.5.

Utah R. Civ. P. 26(b), (c). Alton's discovery does not meet that standard. It instead casts a wide net that would sweep in vast quantities of information with no apparent relevance to the claim Alton may bring. Alton seeks, for example, all "correspondence with Petitioners' members . . . regarding the coal-mining industry"; all "publications regarding coal-fired electric power plants"; and "all of Petitioners' television, radio and print advertisements since November 18, 2009," whether they have anything to do with this proceeding or not. *See* Alton's Proposed Interrogs. & Doc. Reqs., Req. Nos. 14, 20 (filed by Alton with its motion for discovery). Alton also seeks unrestricted authority to depose every person identified in discovery, including (among others) Petitioners' more than ninety individual Board members. *See* Alton's [Proposed] Order Granting Discovery.

For the most part, Alton does not attempt to justify this fishing expedition, asking the Board to "ignore[] at this time" the problems its discovery poses. Alton Reply 10. Alton thus wants the Board to approve the discovery without first ruling that the discovery is proper. But discovery is costly and time-consuming, and the Board "has limited resources and cannot devote its time to acting as a referee for . . . unnecessary discovery disputes." *Soule v. RSC Equip. Rental, Inc.*, No. 11-2022, 2012 WL 5362187, at *5 (E.D. La. Oct. 30, 2012). Granting Alton's request would waste the Board's and the parties' resources by inviting months of discovery disputes—which this Board would have to resolve—over every overbroad or impermissible document request, interrogatory, and deposition Alton seeks advance permission to pursue. The Board need not authorize Alton's improper discovery, and should not do so. *See* Utah R. Civ.

P. 37(c) (empowering courts to "make orders regarding . . . discovery . . . including . . . that the discovery not be had"); *cf.* Utah Admin. Code r. 641-100-300 (providing for the Board's rules to "be liberally construed *to secure just, speedy, and economical determination* of all issues" (emphasis added)).

To the extent Alton implies that First Amendment protections do not apply to the information it seeks, the company is mistaken. For example, *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976), recognizes protection for donor identities. And abundant appellate precedent recognizes protections for confidential advocacy strategies and communications. *See, e.g., AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 177-78 (D.C. Cir. 2003); *see also Perry v. Schwarzenegger*, 591 F.3d 1147, 1162-63 (9th Cir. 2010). Alton's discovery seeks both. *See* Pet'rs' Resp. 17-21. Unrebutted evidence before this Board demonstrates that forced disclosure of such information would chill Petitioners' exercise of their First Amendment rights and deter Petitioners' donors, thereby impairing Petitioners' and their members' "ability . . . to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958). *See* Andrews Decl. ¶¶ 4-5; Brown Decl. ¶¶ 8-12; Groene Decl. ¶¶ 5, 8-9; Maddox Decl. ¶¶ 6-11; Trujillo Decl. ¶¶ 10-11. The First Amendment does not countenance such discovery, and the Board should not allow it.

CONCLUSION

Alton's motion for discovery should be denied.

January 8, 2014

Respectfully submitted,

Stephen H.M. Bloch #7813
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, UT 84111
Tel: (801) 486-3161

Michael E. Wall, *pro hac vice*
Natural Resources Defense Council
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Tel: (415) 875-6100

Margaret T. Hsieh, *pro hac vice*
Natural Resources Defense Council
40 West 20th Street
New York, New York 10011
Tel: (212) 727-4652

Sharon Buccino, *pro hac vice*
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
Tel: (202) 289-6868

Walton Morris, *pro hac vice*
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Tel: (434) 293-6616

Attorneys for Petitioners Utah Chapter of the Sierra Club, National Parks Conservation Association, Natural Resources Defense Council, and Southern Utah Wilderness Alliance

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2014, the original and eight copies of the foregoing PETITIONERS' SURREPLY TO ALTON COAL DEVELOPMENT'S MOTION FOR LEAVE TO CONDUCT DISCOVERY – AWARD OF FEES AND COSTS was hand delivered to the Board of Oil, Gas and Mining and a true and correct copy was e-mailed to the following:

Denise Dragoo, Esq.
ddragoo@swlaw.com

Bennett E. Bayer, Esq.
bbayer@landsrumshouse.com

Steven Alder, Esq.
Kassidy Wallin, Esq.
steve.adler@utah.gov
kassidy.wallin@utah.gov

Michael Johnson, Esq.
makejohnson@utah.gov

Kent Burggraaf
kentb@kane.utah.gov
attorneyasst@kane.net

/s/ Stephen Bloch

Stephen Bloch